IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 325 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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RAMANBHAI H PARMAR

Versus

SONI SUSHILABEN OCHCHAVLAL

Appearance:

(MR SR SHAH) for Petitioner

MR MD PANDYA for Respondent

MR PS CHAMPANERI for Respondent

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 21/09/2001

C.A.V. JUDGEMENT

This revision under Sec.29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (`the Act' for short) has been filed against the judgment and decree dated 3-2-1992 passed by the learned Extra

Assistant Judge, Mehsana, in Regular Civil Appeal No.37 of 1989 whereby he has confirmed the judgment and decree dated 28-2-1989 passed by the learned Civil Judge (J.D.), Visnagar in R.C.S. No.129 of 1986.

2. The facts in short leading to file the present revision are as under;

2.1 The respondent-original plaintiff filed Regular Civil Suit No.129 of 1986 against the petitioner-original defendant for possession of the suit premises on various grounds namely, destruction of property, unlawful occupation of chowk and kitchen, permanent alteration, bona fide personal requirement, acquisition of alternative accommodation and arrears of rent. In short, suit was filed on all available grounds under the Act. At the end of trial, suit was dismissed by the Court below on all grounds except arrears of rent and decree for possession under the provisions of Sec.12(3)(A) of the Act was passed. Against which, an appeal being Regular Civil Appeal No.37 of 1989 was filed by the present petitioner in the Court of District Judge, Mehsana. However, said appeal was also rejected. Hence, the present revision has been filed.

3. Since the plaintiff has not preferred any appeal against the judgment and decree of the Trial Court, it becomes final between the parties and hence, this Court is required to deal with only the ground on which decree for possession under Sec.12(3)(a) of the Act was passed i.e. the arrears of rent. Therefore, learned counsel for the parties have restricted their arguments on that point alone.

4. Heard Mr.S.R.Shah and Mr.P.S.Champaneri, learned counsels the petitioner and the respondent respectively.

5. Learned counsel or the petitioner has argued that petitioner was never a tenant in arrears even prior to issuance of suit notice. Drawning my attention towards the relevant evidence from the record and proceedings, he has argued that an amount of Rs.600/- each was paid by the petitioner to the respondent through cheques on various dates viz., 29-04-1979, 20-04-1981, 12-05-1982, 20-02-1984 and 05-03-1984 and out of these five cheques, four are crossed ones and last one was a bearer cheque. He has contended that as per the terms and conditions of the rent note, the landlord was to pay the tax, still, however, he did not pay the municipal tax including education cess as the assessment was exceeding Rs.300/-per annum and, therefore, the petitioner had to

pay municipal tax to the tune of Rs.291/- towards water connection and the remaining amount of Rs.9/- was sent by money order to the respondent-landlord which is refused by him. According to petitioner, even though he has paid Rs.3,291/-towards the rent to the respondent even prior to the issuance of suit notice, without giving credit to the said amount, respondent has claimed the amount in question by suit notice and, hence, the petitioner was never a tenant in arrears and hence, decree passed on the ground of arrears of rent is based on non-applciation of mind. Since the decree is contrary to the evidence on record, according to him, this Court can certainly interfere even in the revisional jurisdiction.

5.1 He has stated that though specific contention has been raised in reply to notice as also the written statement, the respondent landlord had stated on oath that he has not received any payment of rent by cheques and when he was confronted with the statement of the bank showing that the cheques with specified numbers were credited to the account of the plaintiff then also, he has refused the receipt of the amounts under the said cheques though the certificate issued by the bank under the Bankers Books of Evidence Act was on record. He has contended that the landlord had no regard towards truth and though sufficient opportunity has been given to him time and again from the notice stage till he was in the witness box, he has courage to deny the same. He has argued that he is a schemy landlord who has tried to trap the petitioner-tenant and, therefore, some action should be taken against him.

6. Whereas Mr.P.S.Champaneri, learned counsel for the respondent has mainly argued that the petitioner is a tenant in arrears from very beginning and though suit notice was duly served upon him, he has neither complied nor raised any dispute regarding the standard rent within stipulated time and, therefore, he is tenant in arrears. According to him, all the ingredients to attract the applicability of Sec.12(3)(A) are complied with and, therefore, the Court below has rightly passed the decree on the ground of arrears which is confirmed by the lower Appellate Court. He has further argued that this is a concurrent decree passed by two Courts on the ground of arrears and, therefore, this Court cannot interfere with the same at revisional stage. Even if two view are possible, then also, Court can accept the view taken by the Trial Court. He has contended that both the Courts below have taken into consideration all the cheques which are alleged to have been issued in favour of respondent-landlord and thereafter came to the conclusion

that the petitioner tenant is in arrears of rent and, therefore, Court should not interfere with the concurrent judgments.

6.1 He has relied upon 19 G.L.R. 502 on the applicability of Sec.12(3)(a) of the Act. It has been held by the Apex Court in the said reported judgment as under:

"Sec.12(3)(a) of the Bombay Rent Act makes it obligatory for the court to pass a decree when its conditions are satisfied. If there is statutory default or neglect on the part of the tenant, whatever may be its cause, the landlord acquires a right under Sec.12(3)(a) to get a decree for eviction. But where the conditions of Sec.12(3)(a) are not satisfied, there is a further opportunity given to the tenant to protect himself against eviction. He can comply with the conditions set out in Sec.12(3)(b) and defeat the landlord's claim for eviction. If, however, he does not fulfil those conditions, he cannot claim the protection of Sec.12(3)(b) and in that event, there being no other protection available to him, a decree for eviction should have to go against him. Sec.12(3)(b) does not create any discretionary jurisdiction in the Court. It provides protection to the tenant on certain conditions and these conditions are to be strictly observed by the tenant who seeks the benefit of the section. If the statutory provisions do not go far enough to relieve the hardship of the tenant the remedy lies with the legislature. It is not in the hands of courts."

6.2 He has also relied upon 9 G.L.R 48 on the applicability of Sec.12(3)(a) of the Act. It has been held in para 3 of the said judgment as under:

"There are four conditions which have to be satisfied in order to attract the applicability of Sec.12(3)(a) and they are : (1) the rent must be payable by the month; (2) there must be no dispute regarding the standard rent or permitted increases right upto the expiration of a period of one month from the date of the notice under Sec.12(2); (3) the rent must be in arrears for a period of six months or more at the date of such notice; and (4) the tenant must neglect to make payment of such arrears until the expiration of a

period of one month after the date of such notice. if, in any case, these four conditions are satisfied, the landlord is entitled to obtain a decree for eviction against the tenant. where the tenant is not payable by the month or there is a dispute as to the standard rent or permitted increases at the date of the notice under sec.12(2) or at any rate before the expiration of a period of one month from such notice or the rent in arrears at the date of such notice is not for a period of six months or more, the case would fall within Sec.12(3)(b) and if the conditions of sec.12(3)b) are complied with, the tenant would be entitled to protection, notwithstanding that he was ready and willing or deemed to be ready and willing to pay the standard rent and permitted increases within the meaning of Sec.12(1).

6.3 He has also relied upon AIR 1988 S.C. 1817 wherein the Apex Court has held as under:

"Sub-section (3)(a) of Section 12 categorically provided that where the rent was payable by the month and there was no dispute regarding the amount of standard rent or permitted increases, if such rent or increases were in arrears for a period of six months or more and the tenant neglected to make payment thereof until the expiration of the period of one month after notice referred to in sub-section(2), the Court shall pass a decree for eviction in any such suit for recovery of possession. In the instant case the rent was payable month by month. There was no dispute regarding the amount of standard rent or permitted increases. Such rent or increases were in arrears for a period of six months or more. The tenant has neglected to make payment until the expiration of the period of one month after notice referred to in sub-section (2). The court was therefore bound to pass a decree for eviction."

7. All the authorities relied upon by the learned counsel for the respondent relate to the point as to in what circumstances a tenant can be held to be a tenant in arrears under Sec.12(3)(a) of the Act. There cannot be any dispute regarding the principles laid down by the

Apex court as well as by this Court in the aforesaid reported judgments. Keeping in mind the above principles, I proceed further.

8. It is established from the record and proceedings and from the arguments advanced by the learned counsel for the respective parties that present petitioner-defendant is the tenant of premises in question prior to the respondent purchasing the property from the original landlord on 21-11-1975 (Ex.26). It is clear that the respondent had purchased the property with sitting tenant. It is the case of the respondent-plaintiff that rente note has been executed by the petitioner-tenant on 1-12-1975 for the period upto 31-10-1976 at the rate of Rs.25/- per month. It is also established from the record and proceedings that the original rent note has not come forward from the record though specific demand has been made and order has been passed and, therefore, present petitioner-tenant had produced copy of the rent note as a secondary evidence. Petitioner has also produced the certificate issued by the bank under the Bankers Evidence Act at Exs.62 and 63 and receipts Exs.64, 65 and 66 have been produced and proved by the tenant having paid of Rs.291=24 towards the municipal tax directly to the municipality and receipt of the money order sent by him to the landlord has been produced at Ex.67 and receipt of another money order has been produced at Ex.68. Suit notice has been produced and proved at Ex.27 and the reply has been produced at Ex.30. The respondent-landlord Sushilaben has not stepped into witness box but her power of attorney holder (husband) has stepped into witness box to prove the case of the respondent landlord and his evidence was recorded at Ex.24.

9. The defendant has examined himself at Ex.56 and after taking into consideration the above referred documents and the oral evidence of the parties, the Court below has held that since the banker is not examined, the statement of account showing the payment of amount of rent made to the plaintiff cannot be taken into consideration and, therefore, the defendant was held to be in arrears of rent by the Trial Court. However, the banker was called with the record before the Appellate Court in Regular Civil Appeal No.37 of 1989 and his deposition was recorded with the permission of the Court and three cheques were proved, but as far as the last cheque is concerned, lower Appellate Court has held that the signature of the plaintiff-husband appearing on the said cheque does not tally with the signature of the plaintiff's husband on other documents and, therefore,

the bearer cheque is not encashed by the husband of the plaintiff and on that count, the Appellate Court has also held to the extent of Rs.600/- of the bearer cheque of the defendant in arrears of rent. Therefore, he has confirmed the decree passed by the trial Court. What is required to be seen in this case is the suit notice Ex.27 dated 20-10-1986 wherein it has been specifically mentioned by the respondent-landlord that rent note has been executed by the tenant on 1-12-1975 and the petitioner is a tenant of eastern portion of the premises at the rate of Rs.25/- per month from 1-12-1975 to 31-10-1976 and the defendant was alleged to have trespassed the chowk and room and rent is due from 1-1-1982. The defendant has replied the suit notice by way of Ex.30 wherein he has come out with the specific case that he is not tenant in arrears and rent has been paid by him by cheques. He has given the details regarding the amount and dates of the cheques along with other dates of money orders, etc. and same contention has been taken by him in the written statement also. Therefore, the only question which was required to have been dealt with by the Courts below was whether the amount in question has been paid by the petitioner-tenant to landlord by way of cheques as well as municipal tax by money order or not. As I have discussed earlier, Court below has not believed the defendant only on the ground that banker has not been examined by the defendant and mere production of certificate will not serve the purpose and, therefore, decree on the ground of tenant in arrears has been passed by the Court below. Whereas additional evidence has been led and banker has proved by producing the cheque in the Court and the banker's statement of account to show that the cheques were credited in the account of the plaintiff including the bearer cheque. Then also, the lower Appellate Court had erred in disbelieving the payment of rent through the bearer cheque to the plaintiff despite cantankerous conduct of the plaintiff with regard to payment of rent through cheque. This is the vital conduct of the plaintiff that even though rent was paid through cheques by the defendant to the plaintiff, he, constantly in the notice, the suit, the rejoinder to reply of notice and the deposition, has denied to have received the payments of the rent through cheques and ultimately, he was constrained to reconcile as to the receipt of the rent through cheques in the Appellate Court. This shows that he is a schemy landlord and even though he has received the rent by way of above referred cheques, he has not given any credit to that amount in the suit notice. Though he has been reminded by replying to notice, taking specific plea in the written statement, producing and

proving the banker's certificate and confronting him in the witness box, he has courage to deny the same till he was constrained to reconcile to same at the appellate stage which shows that he has no regards towards the truth and he wants possession of the suit property by hook or crook. It appears that both the Courts below have wrongly held the present petitioner as tenant in arrears by not considering the cheques amount which have been duly proved and, therefore, decree passed by the Court below is not on the basis of evidence. under the circumstances, though it is a concurrent judgment, this Court can certainly interfere in it because evidence on record clearly shows that the petitioner was never a tenant in arrears even prior to issuance of suit notice. If it is accepted that he is a monthly tenant and rent is being paid at the rate of Rs.25/- per month, still it comes to Rs.1,425/- for 59 months i.e. till 31st October, 1986 and as it has been proved that the petitioner-tenant has paid Rs.600/- each on 12/5/1982, 20/2/1984 and 5/2/1984 and Rs.291/-towards municipal tax over and above two money orders, it appears that on the date of notice, the petitioner tenant had paid more than Rs.1,800/- towards rent and in any circumstances of the matter, he was not a tenant in arrears and hence, the finding of the lower Appellate Court that the signature appearing on the bearer cheque is not of the husband of the plaintiff is not the correct. The Court ought to have taken into consideration the tendency of the landlord that he has no regards towards the truth and he is a schemy landlord and when it has been proved at the appellate stage, he has no other alternative but to accept the payments of other five cheques. But he had still some opportunity to deny the last cheque because it was a bearer one and, therefore, Court ought to have held in favour of petitioner-tenant instead of landlord because it is the case of the petitioner-tenant from very beginning that he has paid the above referred amounts to the respondent-landlord by way of Account Payee cheques. Otherwise he had not come out to the say that he has received payment of five cheques and payment of last bearer cheque has not been received by him and when it has been proved by way of evidence that said amount went to the credit of respondent-landlord, then Court below ought to have accepted the same keeping in mind the attitude of the landlord from the day of issuing notice till the appellate stage.

10. Under the circumstances, finding of the lower Appellate Court regarding the signature of the husband of the plaintiff is a first finding and, therefore, this Court can interfere with the same at this stage. I have

also gone through the above referred cheques along with the signatures appearing on them and as I have stated earlier, he is a schemy landlord, he has no regards towards truth and when I hold that the petitioner-tenant is not a tenant in arrears from the date of issuing suit notice, question of holding him as a tenant in arrears is not legal and proper and it requires consideration at the revisional stage. In the above view of the matter, case of the present petitioner-tenant does not fall under Sec.12(3)(a) of the Act and, therefore, judgment and decree rendered by both the Courts below require to be quashed and set aside and this Civil Revision Application requires to be allowed.

11. This Civil Revision Application is allowed. Judgment and decree dated 28-2-1989 rendered by the learned Civil Judge (J.D.), Visnagar in R.C.S.No.129/1986 and confirmed by the learned Extra Assistant Judge, Mehsana in Regular Civil Appeal No.37 of 1989 vide judgment and decree dated 3-2-1992 are quashed and set aside. Rule is made absolute accordingly with no order as to costs.

12. I was thinking to take further step against the Power of Attorney Holder of the plaintiff (husband of the plaintiff) for obtaining decree in favour of plaintiff suppressing the material fact from the Court and deposing contrary to the admitted facts which were admittedly in his knowledge though regularly reminded from the stage of reply to notice till written statement and even documentary evidence were produced on record and before he entered into witness box and was confronted to that effect. But as learned counsel for the petitioner has requested for showing some sympathy towards him, no further order is being passed in this respect.

(R.P.DHOLAKIA,J.)
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